

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in October 2014

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

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HIGHER EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	Moot; Voluntarily Resigned Employment; Resignation; Jurisdiction; State Employee; Relief; Advisory Opinion
<u>CASE STYLE:</u>	<u>Johnson v. West Virginia University</u> DOCKET NO. 2014-1707-WVU (10/6/2014)
<u>PRIMARY ISSUES:</u>	Whether this grievance is moot because the relief sought by Grievant is not available from the Grievance Board.
<u>SUMMARY:</u>	Grievant, Dale Lewis Austin Johnson, was employed by Respondent, West Virginia University, as a Field Site Coordinator. Grievant filed a Level Three grievance with the Public Employees Grievance Board challenging his dismissal from employment. Grievant subsequently voluntarily resigned from his job while the grievance is still pending, rendering the grievance moot.

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COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	Improvement Plan; Evaluation; Unsatisfactory Performance; Misconduct; Correctable Conduct; Job Performance; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Burns v. Lincoln County Board of Education</u> DOCKET NO. 2013-1552-LinED (10/15/2014)
<u>PRIMARY ISSUES:</u>	Whether Respondent's decision to terminate Grievant was arbitrary and capricious.
<u>SUMMARY:</u>	<p>Respondent contends that Grievant was terminated from employment for unsatisfactory performance. Respondent relies on evidence from two of Grievant's supervising principals, an assistant principal, and one of Grievant's mentor teachers as support for the proposition that Grievant failed to improve her performance during the time she spent teaching in Respondent's schools. Grievant argues that her discharge was contrary to the provisions of W. Va. Code § 18A-2-12 because Respondent's evaluations of her were improper, she was not given an opportunity to improve her performance through an improvement plan, and Respondent Board considered factors extraneous to those relevant to performance in terminating Grievant's employment.</p> <p>Grievant was terminated for unsatisfactory performance. The record established that Grievant's colleagues acknowledged her as extremely intelligent, that her unsatisfactory conduct was correctable, and that she made efforts to improve her work performance. The record also established that Grievant was subjected to unfair scrutiny by at least one of her supervising principals inconsistent with state policy requiring that personnel evaluations be open and honest and that improvement plans be implemented for the purpose of correcting deficiencies. Based upon the sequence of events and circumstances considered by Respondent Board, Grievant's discharge was contrary to the provisions of W. Va. Code § 18A-2-12 because Grievant was not given a meaningful opportunity to improve her performance under a validly administered improvement plan. Respondent exercised its authority to dismiss Grievant in an unreasonable fashion, and was arbitrary and capricious. The grievance is GRANTED.</p>

KEYWORDS: Employee Code of Conduct; Professional Behavior; Classroom Management; Arbitrary and Capricious

CASE STYLE: Griffin v. Raleigh County Board of Education
DOCKET NO. 2014-0432-RaLED (10/7/2014)

PRIMARY ISSUES: Whether Respondent had cause to terminate Grievant's substitute contract.

SUMMARY: Grievant was employed by Respondent Raleigh County Board of Education as a substitute teacher. Grievant's contract was suspended, and following a hearing before the Raleigh County School Board. Grievant was not a certified teacher. Rather he was a "RESA substitute teacher," meaning that he holds a permit issued under State Board of Education Policy to persons who do not hold a college degree in the field of education. Grievant's conduct during his short term of substitute teaching at a Raleigh County middle school was not prudent behavior; it was ill-advised, and highly inflammatory.

Respondent suspended and ultimately terminated Grievant's contract for communications and conduct with students, which Respondent assessed to be in violation of Employee Code of Conduct. Respondent, by a preponderance of the evidence, met its burden of proof and demonstrated cause for termination of Grievant's employment. Grievance is DENIED.

KEYWORDS: Inappropriate Language; Falling Asleep in Class; Continued Poor Performance; Hearsay; Willful Neglect of Duty; Americans with Disabilities Act; Irresponsible Conduct; Abuse of Discretion

CASE STYLE: McComas II v. Mercer County Board of Education
DOCKET NO. 2014-1489-MerED (10/24/2014)

PRIMARY ISSUES: Whether Respondent had cause to terminate Grievant.

SUMMARY: Grievant was terminated from his employment as a substitute teacher by Respondent on April 10, 2014, for "continued poor performance" including use of inappropriate language and falling asleep in class. Respondent failed to establish by a preponderance of the credible evidence of record that Grievant used inappropriate language in a classroom on March 24, 2014, as alleged. Respondent established by a preponderance of the evidence that Grievant continued to sleep in class after previously being suspended for sleeping in class. In these circumstances, Grievant failed to establish that the penalty imposed, termination of his employment contract as a substitute teacher, was inherently disproportionate to the proven offense, or represented an abuse of the school board's discretion. Accordingly, this grievance will be granted, in part, and denied, in part.

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COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	Job Responsibilities; Discrimination; Favoritism; Similarly Situated Employees; Arbitrary or Capricious
<u>CASE STYLE:</u>	<u>Thomas v. Logan County Board of Education</u> DOCKET NO. 2014-0439-LogED (10/23/2014)
<u>PRIMARY ISSUES:</u>	Whether the redistribution of custodial duties at an elementary school was based upon favoritism and discrimination.
<u>SUMMARY:</u>	Grievant returned from maternity leave to find that adjustments had been made to the evening custodial positions at her school which reduce the duties for her coworker and added some responsibilities to Grievant. Grievant argues that the duty adjustments were arbitrary and capricious, and based upon favoritism and discrimination. Respondent demonstrated that the adjustments were made as a result of an additional custodian position being added to the school which made it possible to adjust the assignments so that the duties were more evenly distributed and fair. The reasons for the assignment adjustments were reasonable, not arbitrary or capricious, and not the result of favoritism or discrimination. Accordingly, the grievance is DENIED.
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<u>KEYWORDS:</u>	Job Duties; Misclassification; Responsibilities; Job Description
<u>CASE STYLE:</u>	<u>Stewart v. Lincoln County Board of Education</u> DOCKET NO. 2014-0620-LinED (10/30/2014)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved that she is performing the duties of a Secretary III or Executive Secretary.
<u>SUMMARY:</u>	Grievant is employed as a Clerk II/Accountant II, splitting her time between two departments. Grievant asserts she should be classified as a Secretary III or Executive Secretary. Grievant's duties fit both the statutory definition and Respondent's job description for Clerk II/Accountant II. Clerk and secretarial duties overlap, and the only secretarial duties Grievant performs are those that overlap with clerk duties. Grievant is not a secretary. Accordingly, the grievance is denied.

KEYWORDS: Work Schedule; Bus Route Change

CASE STYLE: Skaggs, Jr. v. Ritchie County Board of Education
DOCKET NO. 2014-0516-RitED (10/31/2014)

PRIMARY ISSUES: Whether the changes made to Grievant's bus route after the beginning of the school year violated the statute which precludes changes to an employee's work schedule.

SUMMARY: Grievant is employed by Respondent as a Bus Operator. He argued that Respondent could not legally make the changes it made to his bus route after the beginning of the 2013-2014 school year. By the time of the level three hearing, the 2014-2015 school year had begun, and Grievant's route had been revised to his satisfaction. Grievant, however, argued that he should receive additional compensation for the additional time it took him to complete his route and fuel his bus during the 2013-2014 school year as a direct result of the changes made to his bus route. Grievant did not demonstrate that the changes to his bus route were in violation of the applicable statutory provisions.

KEYWORDS: Overtime; Work Schedule; Job Responsibilities; Discrimination; Favoritism; Untimely

CASE STYLE: Banks, et al. v. Mason County Board of Education
DOCKET NO. 2014-0619-CONS (10/10/2014)

PRIMARY ISSUES: Whether Grievants were entitled to the same back pay received by another group of grievants for an issue on which Grievants did not timely file a grievance.

SUMMARY: Grievants are service personnel employed by Respondent. Another group of service employees successfully grieved and were awarded back pay for Respondent's violation of the "non-relegation clause," and Grievants assert they are also entitled to back pay. The instant grievance was filed more than two years after Grievants were aware of the facts of Respondent's violation of the "non-relegation clause," and Grievants offer no legitimate excuse for their untimely filing. Grievants' recovery of back pay for Respondent's violation of the "non-relegation clause" is time-barred. Respondent's payment of back pay to the other group of employees was not discrimination or favoritism because Grievants, who did not timely file a grievance, are not similarly situated to the other group of employees, who did timely file. Accordingly, the grievance is denied.

KEYWORDS: Sick Leave Bank; Return-to-Work; Arbitrary and Capricious

CASE STYLE: Cross v. Randolph County Board of Education
DOCKET NO. 2013-1509-RanED (10/2/2014)

PRIMARY ISSUES: Whether Grievant established by a preponderance of the evidence that the decision of the Personal Leave Bank Committee in denying her request for thirty-days of sick leave was arbitrary and capricious.

SUMMARY: Grievant is employed by the Respondent as a bus operator. As a result of personal issues, Grievant attempted to take her own life in early 2013. She was hospitalized and treated for physical and mental problems. Grievant's physician released her to return to work on or about January 25, 2013. Superintendent Terry George advised Grievant that she would need to provide further documentation that she was mentally and physically capable of performing her duties as a bus operator. As a result, Grievant was not able to return to work until early March 2013.
Grievant used all of her sick leave at the end of January 2013. Thereafter, she applied for a grant of leave from the sick leave bank. Grievant's application for a grant of leave from the sick leave bank was refused. Grievant appeared to meet the relevant definition of the sick bank policy for a catastrophic medical condition under the facts of this case. It was arbitrary and capricious for the Personal Leave Bank Committee to determine that Grievant was not eligible for a grant of sick leave from the bank because she was not suffering from a catastrophic medical condition. Accordingly, this grievance will be GRANTED.

KEYWORDS: Regular Full-Time Seniority; Job Posting; Position Number; Posting Number; Application Rejection; Arbitrary and Capricious

CASE STYLE: Washington v. Logan County Board of Education
DOCKET NO. 2014-0407-LogED (10/15/2014)

PRIMARY ISSUES: Whether it was arbitrary and capricious for Respondent to reject an employee's application merely because he failed to fill in one blank.

SUMMARY: Respondent rejected Grievant's application for a vacant custodial position because Grievant failed to fill in a blank on his application form with the position number. Grievant argues that the Board's decision to reject his application for that reason when it was otherwise obvious the position for which he was applying, was arbitrary and capricious. Grievant met his burden of proof and the grievance is GRANTED.

KEYWORDS: Written Reprimand; Suspension; Progressive Discipline; Written Policy; Mitigation

CASE STYLE: Shreve, Jr. v. Randolph County Board of Education
DOCKET NO. 2014-1169-RanED (10/10/2014)

PRIMARY ISSUES: Whether Grievant demonstrated that the penalty of a one suspension was clearly excessive and an inherent disproportion between the offense.

SUMMARY: Grievant is employed by Respondent as a bus operator. In the fall of 2013, Grievant received a reprimand for mildly critical comments on a social media outlet. This discipline was not grieved. On February 17, 2014, there was snow on some of the roads of Randolph County. Grievant had no difficulty operating his bus without chains until he reached a turnaround area, which was shaded and had snow and slush. Due to the road being narrow and in a turn, Grievant could not safely put chains on his bus. Grievant's bus got stuck in the snow at the turnaround area. Grievant was suspended for one day without pay for failure to have chains on his bus that day. A fellow bus operator received a letter of reprimand for failure to put chains on the tires of her bus for the same date. A letter of reprimand was sufficient discipline given the facts of this case. Accordingly, this grievance will be granted, in part, and denied, in

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STATE EMPLOYEES

<u>KEYWORDS:</u>	Equal Pay for Equal Work; Pay Grade; Classification; Minimum Hiring Rate
<u>CASE STYLE:</u>	<u>Taylor, et al. v. Department of Environmental Protection/Office of Oil and Gas</u> DOCKET NO. 2014-0559-CONS (10/29/2014)
<u>PRIMARY ISSUES:</u>	Whether Grievants are being properly compensated.
<u>SUMMARY:</u>	<p>Grievants are currently employed by Respondent in the Office of Oil and Gas. All Grievants except Grievant McCourt are Oil and Gas Inspectors. Grievant McCourt is an Oil and Gas Inspector Supervisor. In October 2013, Respondent hired some new Oil and Gas Inspectors at a starting salary in excess of what Grievants were receiving. Although Respondent was under no legal obligation to do so, it submitted a proposal for new minimum hiring rates covering various classifications, including the positions held by Grievant, to the Division of Personnel. This proposal was approved by the State Personnel Board and implemented in February 2014. Grievants employed as Oil and Gas Inspectors were still being paid less than their newly-hired co-workers, although the pay gap was substantially decreased. Grievants failed to demonstrate that any of Respondent's actions violated any statute, rule, policy or procedure, including the equal pay for equal work principle in W. Va. Code § 29-6-10, as interpreted by the West Virginia Supreme Court of Appeals in Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994), and subsequent decisions of this Grievance Board applying Largent to pay equity grievances. Accordingly, this grievance will be denied.</p>

KEYWORDS: Light Duty; Inaccurate Information; Restoration of Leave; Sick Leave; Equitable Estoppel; Detrimental Reliance

CASE STYLE: Waybright v. Division of Natural Resources
DOCKET NO. 2014-0460-DOC (10/17/2014)

PRIMARY ISSUES: Whether Grievant's sick leave and annual leave should be and can be restored.

SUMMARY: Grievant was on sick leave in 2011 for several months. His doctor told him that he could return to work on light duty, prompting Grievant to inquire of DNR personnel whether this was possible. Grievant was mistakenly told that "it is the policy of the WV Division of Natural Resources Law Enforcement Section that light duty is not an option for officers returning to work. We do not offer less than full duty work." Grievant did not pursue the issue, and instead continued to remain off work until September 17, 2011, when he was allowed by his doctor to return to work at full duty. Grievant used 128 hours of sick leave and 80 hours of annual leave from August 1 through September 16, 2011, the time period when his doctor would have approved his return to work on light duty. Respondent, however, did at that time allow officers in the Law Enforcement Section to return to work at less than full duty. Had Grievant been provided the correct information, Grievant would have provided a doctor's statement allowing his return to work on light duty, and Respondent acknowledged it would have allowed him to work from August 1 through September 16, 2011, on light duty/desk duty. The equitable resolution is to restore Grievant's sick leave and annual leave.

KEYWORDS: Drug Testing Policy; Reasonable Suspicion

CASE STYLE: Lewis v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2014-1158-DHHR (10/21/2014)

PRIMARY ISSUES: Whether Respondent had reasonable suspicion to conduct alcohol and drug screen on Grievant based on the facts and circumstances of this grievance.

SUMMARY: Grievant was terminated from his position as a Health Service Worker for refusing to take a drug test when his supervisors told him that they had reasonable suspicion he was under the influence of drugs or alcohol. Respondent's position is that since its policy provides refusal to take a drug test, following the establishment of reasonable suspicion, is grounds for termination, Grievant's refusal to take a drug test warranted his termination. The facts of this case failed to demonstrate reasonable suspicion to require Grievant to submit to a drug test. Therefore, it was improper for Grievant to be disciplined because no basis for drug testing existed, and Respondent abused its discretion in dismissing Grievant. Accordingly, this grievance will be granted.

KEYWORDS: Classification; Temporary Upgrade; Job Duties; Supervisor Duties; Lead Worker

CASE STYLE: Clemons v. Division of Corrections/Ohio County Correctional Center
DOCKET NO. 2014-0302-MAPS (10/8/2014)

PRIMARY ISSUES: Whether Grievant demonstrated that he was assigned duties outside his classification.

SUMMARY: Grievant believes he was required to work out of classification as a supervisor on night shift, and was entitled to be paid as a supervisor when he did so. Grievant did not demonstrate that he was performing the duties of a supervisor when he was the Senior Officer in Charge. The duties Grievant performed as the Senior Officer in Charge were Lead Worker duties, and such duties are envisioned by the classification specification for a Correctional Officer II. Grievant did not demonstrate that he should have been compensated as a Correctional Officer III for any period of time.

KEYWORDS: Discretionary Salary Increase; Classification; Job Duties; Seniority; Additional Duties; Discrimination; Pay Plan Implementation Policy

CASE STYLE: Blair, et al. v. Public Service Commission AND Division of Personnel
DOCKET NO. 2012-0740-CONS (10/1/2014)

PRIMARY ISSUES: Whether Grievants were entitled to receive a 10% discretionary salary increase under the DOP Pay Plan Implementation Policy. Whether the seniority of Grievants was reduced when DOH employees transferred to the PSC.

SUMMARY: Grievants claim that they were wrongfully denied the 10% salary adjustment that was paid to co-workers who are performing the same duties and have the same responsibilities they do. They allege misclassification and discrimination. Grievants also claim that they have lost seniority benefits because the Weight Enforcement Officers were credited with their experience as officers with the DOH when they were transferred to the PSC. Respondent proved that the Weight Enforcement Officers were given the 10% salary adjustment because of significant and more complex duties that they assumed when they transferred to the PSC. Grievants did not assume similar duties and were therefore not similarly-situated to the employees who received to the 10% increase. Grievant failed to prove that they were misclassified or lost any material benefit as a result of the PSC crediting the Weight Enforcement Officers with their DOH experience for purposes of reassigning badge numbers to all of the Motor Carrier Inspectors employed by the PSC.

KEYWORDS: Discipline; Dismissal; Insubordination; Annual Leave

CASE STYLE: Locke v. Insurance Commission and Division of Personnel
DOCKET NO. 2014-0686-DOR (10/8/2014)

PRIMARY ISSUES: Whether the grievance was rendered moot when Grievant voluntarily resigned before the grievance was resolved.

SUMMARY: Respondents argue that once Grievant resigned her employment with the Insurance Commission her grievance became moot. Grievant argues that she continues to seek a ruling concerning her experience and qualification for the previously posted Insurance Commission positions. At this point, even if Grievant were to prevail at level three, all that she could receive would be an opinion regarding whether her experience at the Insurance Commission allowed her to meet the minimum qualifications for the previously posted positions. Even if the positions were reposted, there would be no guarantee that Grievant would be a successful applicant. Any relief that Grievant might receive would be purely speculative or an advisory opinion which the Grievance Board does not render. Accordingly, this matter is DISMISSED.

KEYWORDS: Suspension; Nondiscriminatory Hostile Workplace Harassment; EEO Complaint; Hearsay

CASE STYLE: Taylor v. Division of Juvenile Services/Robert L. Shell Juvenile Center
DOCKET NO. 2013-1605-MAPS (10/6/2014)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that Grievant engaged in nondiscriminatory hostile workplace harassment.

SUMMARY: Grievant was the Unit Manager at Robert L. Shell Juvenile Center. Two employees at the facility filed separate EEO complaints against Grievant accusing him of nondiscriminatory hostile workplace harassment. The Director of the Division of Juvenile Services received the complaints and appointed two EEO investigators to investigate the complaints. The investigators conducted an investigation into the complaints and concluded that one complaint was substantiated, but the other was not. Based upon the investigation, the Director of DJS suspended Grievant for ten days, without pay, and relieved Grievant of his supervisory authority over the facility treatment staff. Grievant denied all allegations of nondiscriminatory hostile workplace harassment. Respondent failed to meet its burden of proving its case by a preponderance of the evidence. Accordingly, this grievance is GRANTED.

KEYWORDS: Selection Process; Most Qualified Applicant; Arbitrary and Capricious; Minimum Qualifications; Grievance Statement; Grievance Procedure

CASE STYLE: Wamsley, et al. v. Division of Highways

DOCKET NO. 2013-1440-CONS (10/24/2014)

PRIMARY ISSUES: Whether Respondent's determination that the successful applicant was minimally qualified for the position was arbitrary or capricious, or clearly wrong.

SUMMARY: This grievance was filed when Grievant was not selected for a posted Transportation Crew Supervisor I position. Grievant argued that the successful applicant for the position was not minimally qualified, because he did not have two years of supervisory experience. Grievant did not demonstrate the successful applicant did not meet the minimum experience requirements.

KEYWORDS: Remedies, Available, Attorney Fees, Costs, Discipline, Coworker

CASE STYLE: McGee v. Division of Highways

DOCKET NO. 2015-0055-DOT (10/30/2014)

PRIMARY ISSUES: Whether the Grievant requested any remedies which are available in the grievance procedure.

SUMMARY: The only remedies Grievant seeks are the removal of Mrs. Staggers from her position, as well as attorney fees and cost incurred in prosecuting the grievance. The Grievance Board has decided on several occasions that both of these remedies are not within the Board's statutory authority to grant. Accordingly, the grievance is DISMISSED.

KEYWORDS: Suspension; Mitigation; Investigation; Good Cause; Excessive; Abuse of Discretion

CASE STYLE: Halley v. Division of Corrections/Lakin Correctional Center
DOCKET NO. 2014-0748-CONS (10/30/2014)

PRIMARY ISSUES: Whether Grievant's conduct violated DOC policies and whether the discipline imposed upon Grievant was appropriate.

SUMMARY: Grievant was suspended pending an investigation into events that occurred on August 29, 2013, and subsequently dismissed from his position as a Correctional Officer IV for various policy violations. Grievant denies Respondent's claims, and argues that his suspension and dismissal were improper. Respondent demonstrated that Grievant's conduct violated its policies and procedures, and there was good cause for his dismissal. Grievant proved that his suspension violated DOC policy and Rule 12.3 of the Administrative Rule. Grievant failed to prove that his dismissal was clearly excessive or an abuse of discretion. Further, Grievant failed to offer sufficient evidence in support of mitigating his dismissal. Therefore, this grievance is GRANTED IN PART and DENIED IN PART.